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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1048

EVERSHIELD PRODUCTS, INC.,
Petitioner,

v.

J. A. SAPP and D. C. SAPP
d/b/a TICE SUPERMARKET,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Florida

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IN THE SUPREME COURT OF THE UNITED STATES

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EVERSHIELD PRODUCTS, INC.
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Petition for a Writ of Certiorari to the Supreme Court of Florida

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Petitioner prays that a writ of certiorari issue to review the decree of the Supreme Court of Florida filed on September 29, 1967, in the above entitled case of Evershield Products, Inc., Appellants, vs. J. A. Sapp and D. C. Sapp, d/b/a Tice Supermarket, Appellees, and the Court's denial of Appellant's Petition for Rehearing entered on October 26, 1967.

OPINIONS BELOW

The opinion of the trial court, The Circuit Court of Lee County, Florida, (L-939) is unreported and is printed in Appendix A hereto, infra, App. 13. The opinion of the District Court of Appeal, Second District of the State of Florida (No. 6833), Printed in Appendix A hereto, infra, App. 15, is unreported. The Supreme

Court of Florida declined to review on appeal and denied Appellant's Petition for Rehearing (App. 39).

JURISDICTION

The decree of the District Court of Appeal, Second District of the State of Florida was entered on February 10, 1967. Notices of Appeal was filed in the Supreme Court of Florida to review the Order, Judgment or Decree of the District Court of Appeals of Florida, Second District. The appeal was dismissed by the Supreme Court of Florida on September 29, 1967, Petition for Rehearing was filed on October 4, 1967, and denied on October 26, 1967.

QUESTION PRESENTED

Whether the Supreme Court of Florida had jurisdiction under the record under that part of the Florida Constitution designated Article V, Section 4, Clause 2, by the District Court of Appeal initially passing directly upon the validity of a state or federal statute or did it construe a controlling provision of either the state or the federal constitution?

CONSTITUTIONAL PROVISION

The constitutional provision involved is the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. The second sentence of Section 1 of the Fourteenth Amendment is set out verbatim below, with the equal protection clause shown in italics.

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner herein will be referred to either as Defendant or Appellant, Respondent herein will be referred to as either Plaintiff, or Appellees, and the following symbols will be used:

TR - Transcript of testimony
R - Record of appeal
A - Appellant's Appendix
E - Appellant's Exhibits

Plaintiffs filed a complaint, (A - pp. 1) which alleged the use of defective materials supplied by Defendant to an applicator franchised in Miami, Florida, sold through an agent in Lee County, Florida. Process was issued and served upon the applicator, a Florida corporation, Evershield Liquid Tile of Florida, Inc.; and at the same time, the president of the applicator was served as an officer of the Defendant, Evershield Products, Inc. (A - pp. 4).

This was erroneous, as the applicator had no corporate connection with the manufacturer, Evershield Products, Inc., a Maryland corporation. The summons on the Maryland corporation was improperly issued and defective in its service.

Subsequently, default was entered against Evershield Products, Inc. (A - pp. 5). The case was submitted to a jury which returned a verdict in the amount of $12,500.00 plus costs (A - pp. 5); and the trial court entered judgment on the verdict on December 4, 1964 (A - pp. 5).

Subsequently, the Defendant was advised of the pendency of the proceedings, secured counsel in Florida to

investigate in December; a petition was filed to test the jurisdiction of the court on the defective process on January 13, 1965 (A - pp. 6). Plaintiffs joined issue on the petition (A - pp. 10) and the court, after taking testimony, adjudicated the matter, holding the process was valid on October 4, 1965 (A - pp. 12), which order had been appealed to the District Court of Appeal in the Second District, which affirmed said order.

Defendant appealed the decision of Second District Court of Appeals to the Supreme Court of Florida and Plaintiff's Motion to Dismiss the Appeal was granted. The Defendant's Petition for Rehearing was denied on October 16, 1967.

STATEMENT OF FACTS

The Plaintiffs own and operate a grocery store in Lee County known as Tice Super Market and entered upon a project to remodel their neighborhood grocery store. An architect had drawn plans for the remodeling, and as a part thereof specified a formulated polyester resin to be used in the food service areas as a coating. The contractor on the job purchased supplies containing these specified polyester resins and secured the services of a Florida corporation, Evershield Liquid Tile of Florida, Inc., to perform the coating job. The Defendant sold the resin under the trade name, "Liquid Tile". The manufacturer of the resin was Evershield Products, Inc., a Maryland corporation, the Appellant in this case.

The Plaintiffs alleged that after the completion of the remodeling, an odor emanated from the food service areas which permeated the whole building and necessitated a rebuilding of that portion. The odor came from that part of the building where the resin had been applied over a base of insulation made of polystyrene. It appeared

the resin was not applied to the polystyrene but was applied to a plaster coating separating the polystyrene and the resin. Also alleged was the fact that the materials, especially the resin, were defective.

Process was issued and served upon George Skadding, who appeared on the officer's summons and return as president of both companies. In truth and fact, Skadding was president of the Florida corporation and had no connection with the manufacturer, which was the Maryland corporation. The summons was erroneously issued and erroneously served on the wrong party. Mr. Skadding did not give notice to the Maryland corporation; and in fact he took no action to let the manufacturer know that the case was pending. He turned the process papers, summons and complaint, over to an officer of the Florida company. A default was entered when the time provided by the Rules for answering expired; and the trial judge presented the matter to a jury. The matter was heard uncontested and a verdict rendered with no one appearing for the manufacturer; and the trial court entered judgment on the verdict.

Subsequent to the verdict being entered, the manufacturer became aware and immediately secured counsel in Florida and a petition was filed to test the jurisdiction of the court and the validity on the judgment on failure of the Plaintiffs to comply with the law with regard to service of process upon the manufacturer as a party defendant and the adequate notice provided for by due process, state and Federal.

In defense the original Plaintiffs relied on the trial notice filed by counsel for the Plaintiffs as required by the Florida Rules of Civil Procedure and on a letter sent from an insurance adjuster for the Florida corporation to the Maryland corporation's office. The trial court denied the petition and reinstated the judgment. The

cause was appealed to the second District Court of Appeal, which court affirmed the trial judge.

Defendant appealed the decision of Second District Court of Appeals to the Supreme Court of Florida and Plaintiff's Motion to Dismiss the Appeal was granted. The Defendant's Petition for Rehearing was denied on October 26, 1967.

REASON FOR GRANTING THE WRIT

The decisions of the Florida Courts in this case are directly in conflict with the equal protection requirements set down by this Court in that:

1. The Defendant, Evershield Products, Inc., did not receive notice of the filing of the Complaint and was not served with process.

2. The Court record on appeal shows that the summons was served on the wrong party, which did not bind Evershield Products, Inc., because said Defendant had no notice.

3. The Constitutional rights of the Defendant, Evershield Products, Inc. were violated in that the procedure did not constitute due process of law under Sections 4 and 12 of the Declaration of Rights of the Constitution of Florida and the Fourteenth Amendment to the Constitution of the United States, and it further violated the equal protection clause of the Constitution of the United States of America, as amended.

ISSUES

I.

THE COURT ERRED IN THAT THE DEFENDANT, EVERSHIELD PRODUCTS, INC. DID NOT RECEIVE NOTICE OF THE FILING OF THE COMPLAINT AND WAS NOT SERVED WITH PROCESS.

II.

THE COURT ERRED IN THAT THE RECORD ON APPEAL SHOWS THAT THE SUMMONS WAS SERVED ON THE WRONG PARTY, WHICH DID NOT BIND EVERSHIELD PRODUCTS, INC. BECAUSE SAID DEFENDANT HAD NO NOTICE.

III.

THE COURT ERRED IN THAT THE CONSTITUTIONAL RIGHTS OF EVERSHIELD PRODUCTS, INC. WERE VIOLATED IN THAT THE PROCEDURE DID NOT CONSTITUTE DUE PROCESS OF LAW UNDER SECTIONS 4 AND 12 OF THE DECLARATION OF RIGHTS OF THE CONSTITUTION OF FLORIDA AN D THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND IT FURTHER VIOLATED THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, AS AMENDED.

ARGUMENT

ISSUE I.

THE COURT ERRED IN THAT THE DEFENDANT, EVERSHIELD PRODUCTS, INC. DID NOT RECEIVE NOTICE OF THE FILING OF THE COMPLAINT AND WAS NOT SERVED WITH PROCESS.

In this cause the best place to start an examination of the record is the Opinion of Judge Pierce of the District Court of Appeal. (A - Index in Memo Brief on Motion to Dismiss) His Opinion states accurately the state of the record with reference to the facts of the case. Also it discusses the law and all the current cases with reference to the problems involved in the issue in this case. It resolves the issue against the Appellant, especially

on the procedural due process questions which were raised before the court and which the court adjudicated.

This appeal arrives at an interpretation of the so-called "Long Arm" Statutes whereby, if a foreign corporation is doing business in Florida through brokers, jobbers, or distributors, or is engaged in a business venture in Florida, it is amenable to the Florida courts' personal service of process by serving the Secretary of State as an agent of the Florida corporation and/or individual. The Statutes are 47.16, 47.17, 47.171, and 47.30. This appeal arose from an order of the trial judge, sustaining service of process under the Statutes obtained earlier upon the corporation and confirming the verdict and judgment rendered pursuant to such service (A-pp. 15-16). The Appellant is the Maryland corporation and manufactures the polyester resins; and another party, Evershield Liquid Tile of Florida, Inc., a Florida corporation, buys, dispenses, and applies such polyester resin and is known as the "applicator". Plaintiffs Sapp brought suit in Lee County Circuit Court against the two corporations, one the manufacturer and the other the applicator, and alleged defective materials. Separate summonses for each corporation were sent to Fort Lauderdale, where they each were served by the Sheriff of Broward County on one George Skadding, president of the corporations. In other words, Skadding was served separately as president of the Maryland corporation and also of the Florida corporation. Evershield Products made no appearance in the Circuit Court and was defaulted. Thereafter a jury ex parte returned a verdict against both corporations in the amount of $12,500, on which judgment was entered December 4, 1964. Thereafter, on January 13, 1965, Appellant filed petition in the Circuit Court and alleged that Skadding was not, on August 12, 1963, the date he was served in Broward County, either president of Evershield Products

or had any relationship with the company and that the president of the company is and was one Paul Petrlik, that the corporation was never served with process through the Secretary of State's office, it did not do business and had no place of business and no resident agent in the State of Florida, and that it bore no corporate relationship with Evershield Liquid Tile, that they were two separate and distinct corporations. The petition also alleged that Appellant had never received a copy of the complaint in this case nor had any process been delivered to its hands and that therefore it was not a party to these proceedings in law or in fact (A - p. 6, et seq.).

Plaintiffs in the suit filed a reply to the petition, admitting that process was issued and served in the cause on August 12, 1963, but denied the other allegations and alleged as affirmative defense that the Maryland corporation did have notice and that the complaint and summons had been issued. It also alleged that Skadding was served as president of the company, that a copy of the complaint had been sent by letter on or about September 11, 1963, to Paul Petrick, the actual president, and that Evershield Products was at all times advised as to the statuts of the suit, that it had notice of trial on damages on November 20, 1964, and did not take any steps to contest the jurisdiction of the court (A - pp. 7-12). After a full hearing and the taking of adversary testimony on October 4, 1965, the Circuit Judge entered an order denying the petition of Evershield Products and confirming the verdict and judgment against the corporation (A - pp. 13, 14).

The first question relates to the evidential support of the trial judge's findings. (Assignment of Errors No. Four and Five). The Judge found as facts that the Appellant was served with a copy of the complaint and summons by service upon the agent of the Appellant transacting

business for it in the State of Florida; second, that the officers of the Appellant received a copy of the complaint and summons by registered mail; third, that the corporation had forenotice of said suit and an opportunity to defend; fourth, that the corporation chose not to raise the jurisdictional question until after the case had been tried before a jury and a verdict rendered and a judgment entered; fifth, that the Appellant did business in the State of Florida through a broker, jobber, or distributor, namely, Evershield Liquid Tile; sixth, that strong economic ties existed between the Appellant and Evershield Liquid Tile; seventh, that service was obtained pursuant to the laws of the State of Florida and that Appellant's Assignment No. Four shows that there is no evidence to support the judgment of the court. The first finding of fact is that the Defendant was duly served with a copy of the complaint and summons in this cause by service upon an agent of said foreign corporation transacting business for it in Florida. At the time of the process being served, George Skadding was not president of the Appellant, he was not even associated with the Florida corporation, he was not an agent for any corporation transacting business for the Maryland corporation, as the findings of fact show; and there is no evidence to show that he was an agent of the Maryland corporation or ever transacted business for the Maryland corporation in Florida at any time. He was, at one time, an employee of the Florida corporation but not at any time during the progress of these proceedings.

The second finding of fact relates to the officers of Evershield Products receiving a copy of the complaint and summons by registered mail. This is taken from the Statute which requires the Secretary of State to send by registered mail the complaint and summons. Actually, the copies referred to in the finding of fact were evidenced by a letter which an insurance adjuster

for the Florida corporation testified that he mailed to the office of Evershield products. He did not perceive that he was serving papers on the Evershield corporation; and no one at that time would have believed that on the basis of that notice, one could be held bound to a Florida decree or judgment. The officers of the corporation testified to the contrary, that they received a letter, but there was no summons or complaint; but the trial judge believed the adjuster and disbelieved the officers of the corporation. The finding does not say the process was served according to the Statutes or according to law.

The third finding of fact with reference to notice is a conclusion based on, I suppose, this same letter which supposedly created an obligation to defend. The writer submits that this finding of fact is erroneous also in that the letter may have provided knowledge that a suit was pending and that Evershield was a party in the complaint; but no reasonable individual, whether layman, lawyer, or judge, could have been convinced <u>at that time</u> that a letter from an insurance adjuster was legal notice which required one to defend a suit in a foreign state. No one would recognize this form of legal service of process; and for that reason, this notice and knowledge are not the same thing.

The fourth finding of fact with reference to choosing to raise the jurisdictional question is a finding of fact with reference to the intent of the Appellant. I was unable to find anywhere in the testimony of either party that a choice was made by any person, either Plaintiff or Defendant, from the evidence presented to the court. Ordinarily a Defendant in a law suit doesn't have much choice about raising or not raising; if he is in court, he is compelled to defend, and if he is out of court, he is not obligated to defend until he is brought before the court properly.

The next finding of fact and the evidential support relates to a holding that Evershield Products did business through a broker, jobber, or distributor. Actually, this is not exactly in evidence either. The evidence showed that the Florida corporation brought a resinous product and that it entered into contracts to apply this as a coating contractor to buildings, mainly, that the manufacturer did not stand responsible for the completed jobs but only stood responsible for the labeling on the containers as it was delivered to the purchaser. The Florida corporation then mixed the material and applied it to walls, along with other jobs which the contractor performed. Subsequently, the Florida corporation was not a broker, jobber, or distributor whereby it sold a product through inter-state lines and obtained a commission on the sales of the product to an ultimate purchaser, such as in the case of an automobile or a cooking utensil or a hand tool. The value in the product is the service that one obtains, the mixing and applying of the material. That is the ultimate cost. If this construction is adopted by the Supreme Court as a proper application of the Statute and if the finding of fact is sustained, then it would also cover a lawyer in New York who wrote a letter to his client in Florida. If one wished to bring a malpractice suit in Florida, he could sue the New York lawyer through the service which the lawyer rendered in the letter and in that sense he would be a broker or distributor for the law firm that delibered the letter here or talked to a client here for the New York firm. In this same sense, he would be a broker, jobber, or distributor. The intent of the Statute on which the finding of fact is made was to cover a product sold, not a service; and the finding in that sense is not supported by the evidence.

The next finding of fact, that strong economic ties existed between the corporations, relates to the evidence

that the Florida corporation was in financial difficulty and owed a large debt to the Maryland corporation. Perhaps there was a strong economic tie in that the Maryland corporation was trying desperately to collect its funds and avoid a loss.

In the final finding of fact with reference to service being obtained under the laws of the State of Florida, the trial judge just made the broad general finding of fact and the evidence showed that process was served as mentioned hereinbefore. Counsel has been unable to find any Statute authorizing service of process through an insurance adjuster by letter with a copy of the complaint attached, if that was so. To say that the insurance company was the agent doing business in Florida for Evershield Products doesn't really accurately state the situation and to state that Mr. Skadding is president of the Maryland corporation doing business for it in Florida does not accurately state the situation. There is no evidence in the record to show that there was an agent of the Maryland corporation doing business for it in Florida or that there was a corporation acting as agent or as a broker, jobber, or distributor that was served. Perhaps the factual situation would have been different if Evershield Liquid Tile of Florida had been served as resident agent of Evershield Products, Inc.; and in this way, by straining the Statute, one could say that the two corporations were related or doing business with each other or that there was some causal connection between the two. This was the theory used in the Mooney Aircraft Case, 332 F.2d 137, et seq. and which was approved. As an impartial reading of the record shows, the findings of fact do not fit with the evidence introduced before the court; and therefore it is accurate to say that the trial judge's findings and the judgment are not sustained by the evidence in the record and that there is no evidence to support them. Consequently, the District Court of Appeal and the trial judge

were in error in holding that these findings of fact upon which the Opinion is based are supported by the record. (TR - P. 1, et seq.)

The second question which has been raised in both lower courts but which was decided only by the District Court of Appeal directly relates to the question of procedural due process guaranteed by Sections IV and XII of the Declaration of Rights of the Constitution of Florida and by the XIV Amendment, as amended, of the United States Constitution. (Assignment of Errors Numbers Two and Three). At the outset, Appellant wishes to advise the court that no reasonable person has any objection to the "Long Arm" Statutes; and it is true that conditions have changed from Colonial America to jet airplanes and immediate communications to where one in business in a foreign state or dispensing its products over a multi-state area should be called upon the defend its product of a service in an area where a purchaser buys this because the cost of trial and the cost of presenting evidence of a technical nature to a court many miles away often is such a disadvantage to a purchaser that the cost of the product does not warrant his bringing it to court. However, at the same time, a business organization is entitled to legal notice prescribed in the constitution in the term "due process of law" whereby it has an opportunity to defend itself from the unreasonable claims or unfounded claims of purchasers. Our Florida Rules provide 20 days to answer the complaint; and the "Long Arm" Statutes provide in detail how one shall be brought before the court. They specify the officers on whom the papers must be served (and by papers the writer means complaint and summons); and if no person is here bearing that capacity, then one may serve the Secretary of State. From the legislative history mentioned in the Mooney Aircraft Case, it is evident that the Florida legislature expects to take all the constitution

allows in constructive service of process against foreign corporations. In each case decided and statute that has been passed, the legislature has immediately expanded its interpretation of the "Long Arm" Statutes to reach foreign corporations in every way that can be constitutionally acquired. The Mooney Case discusses this particular problem, and no litigant can complain with the intent of the legislature or the construction placed by the court on the acts which have been passed. It is evident, though, from a reading of Statutes 47.16 and 47.17 that a method has been provided by which a standard is established which, if followed, will provide a method that will insure knowledge being passed to a foreign corporation and that it would be received by a person in that corporation who had the authority to act on that knowledge. Further, the "notice" or knowledge constructively given must be in such form as it will be recognized as constructive service by the recipient. How many people receiving a letter from an adjuster, no matter what information the letter contained, would anticipate this could be service of process. Traditionally, there has been a requirement that process be serviced by public officials, sheriff, or the Secretary of State. Consequently, while insurance is not maintained that a foreign corporation will receive the notice, it is a reasonable standard; and, if followed, reasonably accurate notice should be given to any corporation anywhere in the United States doing business in Florida. These Statutes have been held constitutional, state and Federal, with reference to providing a method, procedurally, to bring foreign corporations into court via personal service constructively. However, at the same time, the Statutes are in derogation of the common law; and they are to be strictly construed. This would lead one to believe that if he departed from the Statutes, he would have no process at all, and that a person notified contrary to the terms of the Statutes would not be in

court and would not be bound by the jurisdiction or the judgment issued by the local court.

The District Court of Appeal without doubt modeled its decision on Delray Beach Aviation Corp. vs. Mooney Aircraft, Inc., CCA 5, 1964, 332 F.2d 135, which that court stated was a case identical in principle with the case under adjudication. I would suggest to this court two differences: 1) that in the Mooney Aircraft Case, the Florida corporation was served as the Statute provides as a resident agent of Mooney Aircraft, Inc. This was not so in the present case. 2) In the Mooney Aircraft Case, as was intended by the Florida Statutes, one is dealing with a product, an airplane; and in the case subjudice, one is dealing primarily with a service, not a product; and the Statute does not cover the rendering of personal services. Finally, procedurally, there was a different problem. In the Mooney Case, the case in Florida proceeded to judgment; and when suit was brought in Texas to domesticate the Florida judgment, it was attacked. At that time, the only basis for the attack was procedural due process, while in the instant case, the case was attacked in Florida before the judgment was sent to a foreign state for domestication. Consequently, the scope of the attack is much broader by an attack on the evidence as hereinbefore stated. The Texas court, without a doubt in a very well-reasoned opinion, construing Florida law, held Mooney subject to the Florida courts and required it to pay the judgment. Notice that an airplane is not a service but is a product. Such a case had not been decided directly in Florida; and the District Court of Appeal, by making this decision a part of the Florida law, has a novel or new decision which will be binding probably, if accepted by this court, for many, many years to come. The District Court of Appeal did point out that there was another difference, and that was that Mooney did not deny receiving a notice; and in

the instant case the officers of Evershield did deny having knowledge of the case. The District Court of Appeal's Opinion is careful to use the term "notice" rather than "knowledge" or the term "actual notice"; and legal notice provided for in procedural due process is not the same as knowledge that a suit is proceeding. The District Court of Appeal discussed at length the service of process required by the Statute and the extension of the Statute that the Texas court approved by holding that the term "resident agent" mentioned in the "Long Arm" Statute did not necessarily mean the one filed by the corporation with the Secretary of State but the term "resident agent" could apply to any person who had even an incidental relationship to the foreign corporation. It approved, in violation of the rule of strict construction, an extension of the constructive service statutes by saying that the technical term "resident agent" did not really mean what it said but that it included any corporation or individual who was a broker, jobber, or distributor. There was no claim in the pleadings that the product sold to the Florida corporation was not in accordance with the manufacturer's specifications or labeling. The process in the Mooney Case provided that it was served on Metropolitan through its vice-president, cashier, secretary, treasurer, general manager, or director of Mooney Aircraft; and if one is to extend the Statute further than its terms, then this was the correct way to do it; and the Statute provides that these other people must be served first. In the absence of these people, then any agent of the corporation incidental to or connected with the foreign corporation could be served. By expanding one's imagination, one could say that Metropolitan was incidental or connected with Mooney Aircraft in such a relationship that one would have reason to believe that it would communicate information to the Texas company, as in fact it did. However, under due process, all one requires is a reasonable certainty that a person

will act in accordance with a presupposed standard; and whether the information is delivered or communicated is not guaranteed or suggested to be guaranteed by the method provided by the state government. However, it is an extension of the Statute beyond its expressed term, in violation of the common law rule of strict construction.

Now the case at bar goes one step further on top of this extension, or it is an extension upon an extension, if you please. In the case subjudice the process was served upon a wrong person, not connected with or incidental to the foreign corporation, but who had at one time prior to the instigation of the proceedings been connected with the local corporation, the Florida corporation. At this point one passes the constitutional standards whereby one would expect an individual or a business organization to be reasonably obligated to deliver the information, that is, summons and complaint, to the foreign corporation; and in truth and fact this official did not. The situation probably constitutionally would have been no different if he had; but this individual did not. He "called up" someone who he knew was connected with the Florida corporation and would act to protect the Florida corporation's interest; as any party to a law suit does who has insurance, he promptly turned it over to his insurance agent. As it turned out, the policy which he had did not cover the loss; and the agent responded that they had no coverage and that was the end of the matter except that he did send a letter in accordance with company routine to the other parties to the suit, including the Plaintiffs. Contrary to the Mooney Case, the District Court of Appeal did not suggest that Mr. Skadding was a resident agent in the sense mentioned in the Statutes of the Maryland corporation and did not suggest that he was president of the Maryland corporation. The District Court did not suggest that Mr. Skadding had anything to

do with the law suit of the parties or that he was acting in any situation where one would expect him to turn over the summons and complaint to the Maryland company or that he was obligated to act in any such manner.

Looking at the matter differently, one could see that from the letter knowledge was received by the Maryland corporation that a suit had been filed against it in Florida, and looking at the next bit of evidence, that of the notice of damages required by the Florida Rules of Civil Procedure, knowledge was again indicated to their office. The difficult question is at this point. Is one obligated to come from a foreign state when he receives a copy of the pleadings advising him that the case is proceeding in the foreign state without giving him summons and complaint in a constitutional manner? The only knowledge communicated to the Maryland corporation was the letter and enclosures, if it had any, and also the notice. On this basis the Maryland corporation has been held bound to this judgment. Counsel has been unable to find any case even remotely connected that would present legal authority for this position, except for the law of this case. The District Court of Appeal's Opinion, which is written in such a way as to sustain the findings and omits the most serious problems in the file, does show that from this knowledge Evershield Products had the unrestricted right to come to Florida on these two occasions and contest the suit if it desired to do so; and no one can dispute that. But the real question which demands answer is whether they were obligated to do so; and again counsel is unable to find any case that holds that a trial notice or a letter would obligate one under a "Long Arm" Statute to defend a case in a foreign state. The District Court of Appeal disposes of this problem by saying that the Florida Rules of Civil Procedure allow one to test the court's jurisdiction by motion over the person, over the process, and over the service of process; and the problem

about putting a summons and complaint through the statutory channels on the foreign corporation is omitted. The due process problem is acute when one examines closely the facts. For example, if the summons had been served on Evershield Liquid Tile of Florida, Inc., as agent of Evershield Products, Inc., then you have a case strictly within the procedural standards approved by the case law on due process; because whether or not in actuality an agency situation exists, Evershield Liquid Tile of Florida could be called an agent under the situation at hand for the purpose of serving process if the "Long Arm" Statutes apply to personal services. Notice how the situation changes, though, when you serve the wrong party, when an individual is named as president of a foreign corporation and he is served in that capacity as president. That is, a direct service of process is attempted on the corporation by naming an erroneous person in Florida as an officer mentioned in the Statutes. By adopting this mode of procedure, one could serve anyone doing business in the United States by adopting a false name for the president of the company and having process served on an individual physically present in the State of Florida in a supposedly representative capacity. It is common knowledge that officers do not know most of the persons on whom they serve papers but receive direction from counsel as to whom to serve and the address at which to serve them. Consequently, it is difficult to understand how the protection afforded by the due process clause can be subverted or on the other hand sustained through the erroneous service of process on the wrong person by saying, "Well, perhaps it was erroneous and perhaps the directions were false and perhaps this individual has no connection, but by happenstance knowledge was received; and therefore, once knowledge is received, a foreign corporation is compelled to act." In a sense, all the Constitution requires is that the state provide a standard which a litigant must follow in order

to reasonably insure that notice will be transmitted to the Defendant, providing the facts complained of arose within the State of Florida. As legal authorities, the court's attention is directed to Penoyer vs. Neff, 95 U.S. 714; International Shoe Company vs. Washington, 326 U.S. 310; and Wuchter vs. Pizzuti, 276 U.S. 13, 48 S. Ct. 259, 72 L. Ed. 446, 57 A.L.R. 1230. The Florida standard was announced in Mason vs. Mason Products Co., Florida 1953, 67 So. 762, at page 763. The Florida standard is and has been that the agent must have a legal or moral duty to report and properly handle the summons served upon him as agent of the foreign corporation. (Emphasis supplied). As to the constitutional standards for notice, these were announced by the United States Supreme Court in Cannon Manufacturing Co. vs. Cudahay, 1925, 267 U.S. 333. This case held that where a foreign corporation solicited customers in North Carolina through a wholly owned subsidiary, and suit was instituted against the subsidiary, attempting to bind the parent corporation, the parent corporation was not amenable to suit through the subsidiary, even though wholly owned and completely controlled by the foreign corporation.

The following cases give the legislative history: Davis Berkman vs. Ann Lewis Shops, 246 F.2d 44; Fawcett Publications vs. Rand, 144 So. 2d 512; Deere & Co. vs. Watts, 148 So. 2d 529; International Shoe Company vs. Washington, 326 U.S. 310, 66 S. Ct. 154; Dooley vs. Payne, 326 F. 2d 941, 5th Circuit 1964; Hanson vs. Denckla, 357 U.S. 235; Weber vs. Register, 67 So. 2d 619, 1963, Florida Supreme Court.

In this area there is one other group of cases that requires discussion; and this is that group of cases that holds that substituted process is valid against a foreign corporation not authorized to do business in this state, providing that the cause of action arose in this state or

that the facts of the case are such that a Florida person is involved with a foreign corporation while he is conducting his business affairs wholly in the State of Florida. This is a condition which has been grafted onto the Statute by the courts. It is true, as a matter of fact, in this matter before the court, that the job which was being performed by the Florida corporation took place in Florida and that the dispute which arose among the parties at that time arose out of actions of the Florida corporation, use of materials in a job in Lee County, Florida, which brings it within the conditions announced in these cases. It is distinguishable in one particular fact and that is that in the case at bar one is dealing with a service primarily rather than a product. The District Court of Appeal in its Opinion, on page 18, held that the cause of action arose out of activities of the foreign corporation within this state because of the noxious odors alleged in the complaint. This also stretches the matter quite far, as in truth and fact, the foreign corporation sold materials to another Florida corporation. The second corporation then sold a service and the dispute arose out of the service. There is an intervening step along the way which was not involved in the cases which are cited herein. It is in this particular feature that one is extending the doctrine of substitute service beyond that area where there is direct contract with the purchaser. The Appellant did not sell anything to the persons who brought the claim and in fact had no contact with them. The cases referred to are Zirin vs. Pfizer & Co., Inc., 121 So. 2d 694, 128 So. 2d 594; H. Bell & Associates, Inc. vs. Keasbey & Mattison Co., Fla. Appeals 1962, 140 So. 2d 125; Confederation of Canada Life Insurance Co. vs. Vaga Y Arminan, Fla. Appeal 1962, 144 So. 2d 805. This case is significant in that it held that the corporation would be bound if it only had fair and ample notice of the suit against it; and the Canada Life Insurance Company case cites a Supreme Court case, Perkins vs. Bengue' Consolidated Mining Company, 342

U.S. 437, 72 S. Ct. 413, 96 L. Ed. 485. Based on an analogy to the Canada Life Insurance Company Case, one is led to believe that if a suit were filed in Lee County, for example, against a company whose principal office was in New York, and it were carried on a wire service and one read it in the newspaper, then he would be bound if the newspaper account contained a fair and ample notice of the allegations in the complaint. The facts of case are somewhat different from this analogy; but it points up strongly the constitutional procedural problem as to what kind of a standard the state may impose within the restrictions imposed by the Constitution to provide an adequate method of notice. The late Supreme Court cases of Giannini Controls Corp. vs. Eubanks, Florida 1966, 190 So. 2d 191; and Illinois Central Railroad Company vs. Simari, Florida 1966, 191 So. 2d 427; and the 4th District Court case of Bradbury vs. Savage, Inc., Florida Appeal 1966, 190 So. 2d 183, all hold cases of invalid process on slightly distinguishable grounds; but are important in surveying the whole field encompassed by this problem constitutionally.

In summary, this group of cases seems to say that if a foreign corporation is doing business in Florida and the cause of action sued upon arose out of the activities of that foreign corporation in the State of Florida, it is subjected to the substitute service required by the Statutes and that if the substitute service does not comply with the Statutes, then the cases do not say what results; and, in fact, this is the situation before the court in this case. Notice please that in each of these cases the ruling is bottomed on the fact that there is a direct connection between the foreign corporation and the person in Florida who sues, which is not the case subjudice. One other interesting fact appears from a study of the Florida cases and the United States Supreme Court cases and that is that it is immediately apparent that Florida is using

one standard for due process under its constitution and the United States Supreme Court has announced a differing test and the cases are an effort by the judiciary to "fit the facts" under both of these standards, which are not necessarily the same. The Florida test is shown in Mason vs. Mason Products, infra, and the United States Supreme Court test is shown in the International Shoe Company case, infra. The United States Supreme Court has not yet held that a state must provide a fixed procedure to bind a foreign corporation extra-territorially to the jurisdiction of the form. It is assumed throughout all the opinions, state and Federal, that a state has supplied this method and that the method has been complied with. The writer suggests to the court that the case at bar is the first case among all of these authorities where there is a departure from the statutory procedure.

All of the cases examined by the writer deal with a product except this one which deals with a personal service, a coating contractor.

Also there is an interesting problem in this case which could result in an abuse of the "Long Arm" Statute by the method by which evidentiary matters are settled in the trial court. Notice the evidence in the record whereby the management of the Florida corporation denied receiving notice prior to default. The Appellee presented evidence that notice, its pleadings, complaint, and summons, were sent by oral testimony, based on the business routine of a non-party witness. The court, as it had a right to do, resolved this question of fact against the foreign corporation; and that item is probably foreclosed. Except for insufficient evidence to support its fact, the District Court of Appeal holds that because of the finding of fact by the trial court, the foreign corporation had a right and was bound and required to come and defend. The defense is based on the fact that it did not defend because it did know it. This, then, by using or citing

the Florida Rules of Civil Procedure with reference to jurisdictional defenses, provides a reasonable answer that one should come and test the jurisdiction of the court upon receipt of knowledge. By this procedural method, if one is not believed, he loses his defenses before he can get to court; and if it might be suggested that the trial court could be in error, that is, he believed the wrong witness, then one lost his defense before he got to court because he had no way to present it. At this point, the judgment rests on oral testimony, which is a lot more unreliable than a summons returned by an officer, as almost all judgments rest. Consequently, there is another problem that arises in a situation such as this. If one desired to procure a judgment, it would be easy to present knowledge to a foreign corporation without complying strictly with the Statutes until a default was obtained and then defend the default by writing letters and obtaining service of process through counsel by notice rather than complying with the Statutes and supplying pleadings and summons as most people feel the law requires. The United States Supreme Court standard of constitutionality, providing there are certain minimum contacts with the state and providing the procedure does not offend traditional notions of justice and fair play, is so broad that among the states some more definitive test needs to be devised in order that people will know with certainty when they have the opportunity to go defend or when they have an obligation to defend, which terms are substantially different. Another interesting question develops at this point. Could one impeach the return of an adjuster? Is he liable civilly for erroneous service of process?

It is evident from the judgment entered in the trial court and also in the District Court of Appeal that both courts were over-persuaded by the colorful language and the very well-reasoned opinion in the Mooney

Aircraft Case, infra. The cases presented herein show the development of the law in Florida and this case in the District Court of Appeal engrafts the Mooney decision as the law of Florida. It was a decision by a Circuit Court of Appeal on what the Florida law would be in those circumstances. However, that case distinguishes itself from the one subjudice on the basis that the retailer of the product in Florida, Delray Beach Aviation Corp., was served as a resident agent of the Mooney Aircraft Corp.; and this is the crux of the matter. The District Court of Appeal felt differently, and, in applying it to the present case, came up with the result that as long as, somehow, the foreign corporation received knowledge of the contents of the summons and the contents of the complaint, that the Mooney Aircraft Case was applicable to the case at bar. If that is so, then it is the position of the Appellant that the Statutes are unconstitutional in that they do not provide a standard whereby a corporate citizen of a foreign state will recognize when he is obligated under the Florida "Long Arm" Statutes; that is to say, that "the application of the Florida Statutes, which are mentioned herein, to the particular case at bar, makes them unconstitutional in their application to this case for the following reasons. First, it provides no standard by which a person will know when he is bound by the jurisdiction. Second, it provides inadequate time under this method. Third, it is too vague, uncertain, and indefinite to bind a foreign corporation under the constitutional requirements of the Florida constitution, the Declaration of Rights, and the United States Constitution, XIV Amendment, due process and equal protection clauses." This method provides no fixed time in which to answer the complaint. It is insisted that there is no evidence supporting the judgment in that there is no agent in Florida served in any regard. On this basis, the "Long Arm" Statutes do not apply. There was an attempt at direct personal service which failed; and this

case since then has been a method to correct that error by applying the "Long Arm" Statutes to a situation in which the legislative intent would not apply. The law provides one way for direct personal service and it provides another method for constructive service. The method employed at the origination of this suit was direct personal service; and it has been sustained on a jurisdictional basis because of the constructive service statutes which were not complied with. On this basis, there is no evidence to support the order of the trial court or the opinion of the District Court of Appeal.

ISSUE II.

THE COURT ERRED IN THAT THE RECORD ON APPEAL SHOWS THAT THE SUMMONS WAS SERVED ON THE WRONG PARTY, WHICH DID NOT BIND EVERSHIELD PRODUCTS, INC. BECAUSE SAID DEFENDANT HAD NO NOTICE.

The record on appeal indicates that the complaint which was served on the wrong party was not delivered to Evershield Products, Inc. The president of the appellant testified that he never received the complaint and that the only document received by him was a trial notice which was received during the course of ordinary mail and which he thought was sent to him by error (TR. 6-7). He never heard or knew that the litigation was pending. The manager of Evershield Liquid Tile of Florida, Inc. testified that when he received the complaint, he did not forward it to Evershield Products, Inc. as no one told him it was his duty to do so, and he thought that it would be brought into court by other means (TR. 24, 31). The plaintiffs produced a witness who was an insurance adjustor who testified that he sent a letter to the president of Evershield Products, Inc., and according to his best recollection, he sent a copy of some part of the pleadings with it (TR. 41, 42, 43). He said this was so

because from the letter it showed that there was an enclosure and it was his practice to send pleadings to other parties when they came into his possession. Mr. Petrik testified that if Mr. Tozzie sent the pleadings to him that he never received them. This is all the evidence with reference to notification of the appellant of the pendency of the suit. It is uncontroverted that the summons was served on the wrong party and that the party on which the complaint was served made no effort to notify the appellant. Consequently, the appellant asserts that it is not bound by the proceedings and the court was in error in failing to void the judgment against this defendant and to vacate the judgment as to it. The Florida Rules specifically authorize the procedure by motion to attack a judgment on a jurisdictional basis and a judgment which is void is subject to collatoral attack at any time in any court. A situation like this is subject to great abuse and if the court lends judicial approval to this means of "hailing people into court", one's rights to present his defense and have his day in court are seriously impaired.

ISSUE III.

THE COURT ERRED IN THAT THE CONSTITUTIONAL RIGHTS OF EVERSHIELD PRODUCTS, INC. WERE VIOLATED IN THAT THE PROCEDURE DID NOT CONSTITUTE DUE PROCESS OF LAW UNDER SECTIONS 4 AND 12 OF THE DECLARATION OF RIGHTS OF THE CONSTITUTION OF FLORIDA AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND IT FURTHER VIOLATED THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, AS AMENDED.

The constitutional standards for notice announced by the United States Supreme Court in Cannon Manufacturing

Co. vs. Cudahay, 267 U.S., 333 (1925 Supreme Court) this was a case wherein a foreign corporation solicited customers in North Carolina through a wholly owned subsidiary, and suit was instituted against the subsidiary attempting to bind the foreign corporation. The Supreme Court held that the parent corporation was not amenable to suit through the parent corporation or its organization even though it was wholly owned and completely controlled by the foreign corporation. A Second Circuit Court of Appeal case deals with this same subject. The case is Davis Berkman vs. Ann Lewis Shops, 246 Fed. 2nd., 44. This case occurred in Hillsborough County, Florida, and was brought in the District Court on diversity of citizenship. Ann Lewis Shops, Inc. was a Delaware corporation qualified to do business in New York and maintained its principal office in New York City. The president leased space in Tampa from an assignor and formed a corporation to operate a retail store named Ann Lewis Shops of Tampa, Inc. The subsidiary entered into a lease which was guaranteed by the parent corporation. The president and secretary were common officers in both corporations. All of the stock was owned by the parent corporation. The subsidiary defaulted on the lease and suit was instituted in Hillsborough County under the Long Arm Statutes, 47.16 and 47.30 and a judgment was rendered. Subsequently, suit was instituted in New York on the Florida judgment to collect it and the guarantor attacked the suit on whether the Florida court had jurisdiction. The Second Circuit Court of Appeals held that the court had no jurisdiction as proper service under the Long Arm Statutes would not bind the Delaware corporation with offices in New York City.

Another case in Florida is Fawcett Publications vs. Rand, 144 So. 2d, 512. In an opinion by Mr. Justice Horton the pleadings showed a libel against a Delaware corporation which was attacked by motion to dismiss

based on no jurisdiction. The trial judge denied the motion to dismiss and an interlocutory appeal was taken. The pleadings alleged that Fawcett Publications sold magazines to an independent contractor in Florida. Fawcett maintained no office or employees or exercised any other control after the magazines were sold and shipped from its Louisville, Kentucky office. The home office of Fawcett was located at Greenwich, Connecticut. A Third District Court reversed and held that under the circumstances, Fawcett Publications was not amenable to proper service under the Long Arm Statutes, 47.30 and 47.16. The court said that the Long Arm Statutes were very strictly construed and that the factual situation presented here showed that their foreign corporation exercised no control over personal property in Florida in the hands of brokers, jobbers, wholesalers, or distributors, and further that the pleadings did not show that the foreign corporation had some control over the people selling and distributing the product in this state.

In the case at bar the evidence clearly shows that although no effort was made to comply with the Long Arm Statutes, the applicator purchased his materials in Joppa, Maryland, and that the applicator was solely responsible for doing the job which is the subject of the dispute. Further, the manufacturer had no responsibility for the materials and for their mixing and their use on the job by the contractor. Further, that the applicator was under no control from the Maryland corporation and was not owned by the Maryland company and the Maryland corporation had no control over the employees of the Florida corporation or over the products it bought once they were shipped from Maryland. The case at bar is even stronger than the Fawcett case because no effort was made to comply with the Long Arm Statutes.

In looking at the whole problem of a state extending its territory to non-resident companies, one must keep in mind the rule that due process requires that the defendant have certain minimum contacts with the territory of the forum, and these contacts must be such that the maintenance of the suit does not offend "traditional notions of fair play" and "substantial justice."

Recent cases show that aside from the due process clause in the State and Federal Constitutions, each person is entitled to equal protection from claims, and that one cannot arbitrarily discriminate in the acquisition of persons or property in foreign states. The Long Arm Statutes have been constitutionally approved based on the standards herein enumerated, the cases cited, and on the periphery of what is permitted and what is not permitted to the state to extend its powers over citizens of other states without having them present in the geographical boundaries of the state in order to bind them to the court's jurisdiction.

This is not a case of whether there is some technical defect in the manner of acquiring jurisdiction through a constitutionally approved method, and it is not a case where there is no question that a citizen of a foreign state received notice but decided to take the bold stroke and ignore the process and refused to voluntarily appear and subject itself to the court's jurisdiction. The crux of the matter here is that the defendant did not receive notice and had no opportunity to defend, and this is the point and the basis for the prohibition that a person must be guaranteed some method, not necessarily notice, but some method to assure that a prescribed effort will be made to notify him of the pendency of the claim against him.

While responsible judges, lawyers and litigants will probably forever dispute the constitutional standard as

to what constitutes a traditional notion of fair play and what amounts to substantial justice, hardly anyone can say that it is fair play or justice to bind a citizen or a corporation of a foreign state 1000 miles from the forum, who had no notice, and that the plaintiff failed to comply with a constitutionally approved method available to it in order to guarantee a method and a record that the corporation or defendant was attempted to be reached in the foreign state.

Notice the case of Deere and Co. vs. Watts, 148 So. 2d. 529, decided by the Third District Court of Appeal in 1963 on an opinion by Judge Hendry. The suit was instituted on breach of warranty on a tractor which had overturned on plaintiff's decedent. Deere and Company, a national corporation, had offices for this particular operation in Moline, Illinois. Deere and Co. owned all of the stock of John Deere Company of St. Louis, Missouri. John Deere and Co. of St. Louis did business in Florida and the latter company was wholly owned by the parent. The corporations had common officers and the parent company set all of the policies for the captive subsidiary corporation. The Third District Court of Appeals held that they were amenable to process through the Long Arm Statutes because they were doing business in Florida and also that the elements of control were present over the Florida operation.

Notice also, this case distinguishes itself from the case at bar in that first, there was no ownership of stock in the Florida corporation; the Maryland corporation did not set any policy for the Florida corporation; it had no control over the Florida corporation, and the Maryland corporation had no contacts with reference to the Florida operation, with the exception of sales personnel calling upon it and to offer technical advice with reference to use of its materials and collection. Selling products from a foreign state which are bought by persons

in the state are not such minimum contacts or do not constitute "a business venture in the state" whereby foreign corporations are subjected to Florida state court jurisdiction, even though the Long Arm Statutes are followed.

The Constitutional Standard is also announced in the case of International Shoe Company vs. Washington, 326 U.S., 310, 66, Supreme Court, 1954.

CONCLUSION

The application of the Florida Statutes, which are mentioned herein, to the particular case at bar, makes them unconstitutional in their application to this case for the following reasons. First, it provides no standard by which a person will know when he is bound by the jurisdiction. Second, it provides inadequate time under this method. Third, it is too vague, uncertain, and indefinite, to bind a foreign corporation under the constitutional requirements of the Florida constitution, the Declaration of Rights and the United States Constitution, XIV Amendment, due process and equal protection clauses, and accordingly, your Petitioner respectively requests that the Order of the lower Court be reversed and the cause be remanded with direction for the entry of an Order dismissing the Complaint filed in this case.

Respectfully submitted,

SAMUEL KIMMEL,

Counsel for Petitioner.

KIMMEL & POKORNY
Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appellant's Brief has been furnished to DUANE A. REYNOLDS of the firm of HENDERSON, FRANKLIN, STARNES & HOLT, P. O. Box 280, Fort Myers, Florida, 33902, Attorneys for Appellees, this day of January, 1968.

Of Counsel.